IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64373-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ODIS KEITH RUSSELL,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 19, 2010
	)	
	)	

Cox, J. — Odis Russell appeals his conviction of violation of the Uniform Controlled Substances Act (VUCSA). The charging information stated that he "unlawfully and feloniously did posses Heroin, a controlled substance and narcotic drug." He claims that the "to convict" instruction did not include an essential element of the crime—identification of the controlled substance as heroin. Assuming without deciding that omission of this identification was error, it was harmless beyond a reasonable doubt in this case. The uncontroverted evidence in this record is that the only controlled substance at issue was heroin. We affirm.

On April 21, 2009, Seattle Police Officer Douglas Beard observed Russell and another man sitting on the steps of a pedestrian overpass. He observed the men filling needles from a tin can that sat over an open flame. After a second officer arrived at the scene, Officer Beard arrested the men.

The State charged Russell with VUSCA: unlawful and felonious possession of heroin. The trial court's "to convict" instruction to the jury did not identify the controlled substance as heroin. Here, the "to convict" jury instruction stated,

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 21, 2009, the defendant possessed a controlled substance; and
>
> (2) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.[1]

Russell did not either object or take exception to this instruction.

A jury convicted Russell as charged. At sentencing, the court calculated that Russell's sentencing range was 12 to 24 months, with a statutory maximum of five years of confinement. The court imposed a Drug Offender Sentencing Alternative of three months in residential treatment and 24 months in community custody.

Russell appeals.

MANIFEST ERROR

[1] Clerk's Papers at 34.

The State argues that Russell waived his challenge to the "to convict" instruction by failing to raise it below. We disagree.

An appellate court may refuse to review any claim of error which was not raised in the trial court.[2] However, there is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right."[3] "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice."[4] To demonstrate prejudice, the defendant must make a plausible showing that "the asserted error had practical and identifiable consequences in the trial of the case."[5]

The State appears to agree that the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, but argues that the error is not "manifest" under these facts because Russell did not show that the omission of the name of the controlled substance in the "to convict" instruction had practical and identifiable consequences in the trial of the case. This argument is not persuasive.

In State v. Mills,[6] our supreme court held that "the issue of omission of an element from [the 'to convict'] instruction is of sufficient constitutional magnitude

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[2] RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

[3] RAP 2.5(a)(3).

[4] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

[5] Id.

[6] 154 Wn.2d 1, 109 P.3d 415 (2005).

to warrant review when raised for the first time on appeal."[7] There is no other more recent supreme court authority to the contrary. Accordingly, we adhere to the principle stated in that case.

IDENTIFICATION OF CONTROLLED SUBSTANCE

Russell argues that it was reversible error for the State to fail to include the identity of the controlled substance (heroin) in the "to convict" jury instruction because the identity of the controlled substance was an essential element of the crime. We disagree.

"'The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.'"[8] "Therefore, 'a "to convict" [jury] instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence.'"[9] We may not look to other jury instructions to supply a missing element from a "to convict" jury instruction.[10]

The identity of a controlled substance is an essential element of a crime where it increases the statutory maximum sentence that a defendant may face upon conviction.[11] Under RCW 69.50.4013 a conviction for possession of a

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[7] Id. at 6.

[8] State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)).

[9] Id. (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953))).

[10] Id. (citing Smith, 131 Wn.2d at 262-63).

[11] Id. (citing State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410

controlled substance generally carries a maximum sentence of five years of confinement. However, as Russell points out, a conviction for possession of less than 40 grams of marijuana carries a maximum sentence of one year of confinement. Therefore, the identity of the controlled substance in this case determined the level of the crime and its penalty, rendering it an "essential element."[12]

In State v. Sibert,[13] a plurality of our supreme court recently decided under substantially similar circumstances that omission of the identity of a controlled substance in the "to convict" instruction for a VUCSA charge was not error.[14] Only four members of the court signed the lead opinion concluding there was no error.[15] A fifth justice concurred in that result only, but supplied no rationale for the concurrence.[16] Three other justices dissented, concluding that the omission of the name of the substance—methamphetamine—was error, but harmless beyond a reasonable doubt.[17] Thus, there was no rationale that commanded a majority of the court in that case.

(2004)).

[12] Id. at 312 (citing Goodman, 150 Wn.2d at 785-86).

[13] 168 Wn.2d 306, 230 P.3d 142 (2010).

[14] Id. at 309.

[15] Id. at 317.

[16] Id.

[17] Id. at 318, 325.

"'A plurality opinion has limited precedential value and is not binding on the courts.'"[18] It is not possible to assess the correct holding of an opinion signed by four justices with the fifth vote concurring in the result only.[19] Accordingly, we are guided here by Justice Alexander's dissent, which concluded that the omission of the identity of the controlled substance in the "to convict" instruction for a VUCSA charge was harmless beyond a reasonable doubt and that the conviction could be affirmed on that basis.

"As a general principle, an erroneous jury instruction is ordinarily subject to harmless error analysis."[20] But "'[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.'"[21] Because the "to convict" instruction here included some of the elements of the charged crime, automatic reversal is not required.[22]

Under harmless error analysis, an omission or misstatement of an element in jury instructions is harmless if that element is supported by uncontroverted evidence.[23] "Restated, '[i]n order to hold the error harmless, we

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[18] Kailin v. Clallam County, 152 Wn. App. 974, 985, 220 P.3d 222, 227 (2009) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

[19] Id. at 985-86 (internal quotations omitted).

[20] Sibert, 168 Wn.2d at 320 (Alexander J. dissenting) (citing State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003)).

[21] Id. at 312 (quoting State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)).

[22] Id. at 320; DeRyke, 149 Wn.2d at 912.

must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error."[23]"[24]

Here, for the same reasons as in Sibert, the instructional error was harmless beyond a reasonable doubt. First, heroin was the only drug at issue and the only drug the prosecution proved through expert testimony. Second, heroin was the only drug mentioned in closing arguments: it was referenced 13 times by the prosecutor. These reasons support the conclusion that the identity of the controlled substance was proved by uncontroverted evidence. Thus, the omission of the identification of the drug from the "to convict" instruction was harmless beyond a reasonable doubt.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Dwyer, C. J.

Becker, J.

[23] Id. (internal citations omitted).

[24] Id. (quoting Brown, 147 Wn.2d at 341 (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))).